Supreme Court, U.S.
FILED
SEP 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED ARTISTS COMMUNICATIONS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR AMICI CURIAE IN SUPPORT OF RESPONDENT AND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT W. BERGSTROM
BERGSTROM, DAVIS & TEEPLE
39 South LaSalle Street
Suite 800
Chicago, Illinois 60603
(312) 641-1420

Attorney for Amici Curiae
BUENA VISTA DISTRIBUTION CO., INC.
COLUMBIA PICTURES INDUSTRIES, INC.
EMBASSY PICTURES,
ORION PICTURES DISTRIBUTION CORP.
PARAMOUNT PICTURES CORPORATION
TWENTIETH CENTURY-FOX FILM CORPORATION
UNITED ARTISTS CORPORATION
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. DISTRIBUTING CORPORATION

Pandick Midwest, Inc., Chicago • 733-6000

QUESTION PRESENTED

Whether petitioner, which expressly waived in the court of appeals any appeal of the merits of the district court's findings of fact and its conclusions, and which acknowledges in its petition to this Court that the modification by the court of appeals of the district court's injunction is in accordance with the requests made by petitioner to the court of appeals, may maintain this appeal solely to object that "the Seventh Circuit's opinion contains language which could be interpreted as condemning even so-called 'good' splits. . . ." (Petition, p. 4.)

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE WRIT	5
I. PETITIONER HAS ACQUIESCED IN ALL OF THE RULINGS OF THE LOWER COURTS AND THERE IS NO ORDER OR DECREE AS TO WHICH IT SEEKS REVERSAL. PETITIONER HAS FAILED TO PRESENT ANY JUSTICIABLE CONTROVERSY FOR RULING BY THIS COURT	5
II. THERE IS NEITHER A CONFLICT AMONG CIRCUITS NOR ANY NEW ISSUE FOR DETERMINATION BY THIS COURT. HORIZONTAL ARRANGEMENTS TO FORECLOSE COMPETITION SUCH AS THIS HAVE UNIFORMLY BEEN CONDEMNED BY COURTS OF APPEAL AND BY THIS COURT	7
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	PAGE
Admiral Theatre Corp. v. *Douglas Theatre Co.*, 437 F. Supp. 1268 (D. Neb. 1977), *aff'd*, 585 F.2d 877 (8th Cir. 1978)	9
Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982)	12, 13
Broadcast Music, Inc. v. *Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (1979)	11, 12
California v. *Taylor*, 353 U.S. 553 (1957)	7
Catalano v. *Target Sales*, 446 U.S. 643 (1980)	12, 13
Cinema-Tex Enterprises, Inc. v. *Santikos Theatres, Inc.*, 414 F. Supp. 643 (W.D. Tex. 1975) *aff'd in part and rev'd in part*, 535 F.2d 932 (5th Cir. 1976)	9
Continental TV, Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977)	11
Dahl, Inc. v. *Roy Cooper Co., Inc.*, 448 F.2d 17 (9th Cir. 1971)	8, 9
General Cinema Corp. v. *Buena Vista Distribution Co., Inc.*, 532 F. Supp. 1244 (C.D. Cal. 1982)	9, 10
Greenbrier Cinemas, Inc., v. *Attorney General*, 511 F. Supp. 1046 (N.D. Va. 1981)	10
Gunn v. *University Committee*, 399 U.S. 383 (1970)	7
Jones v. *Hildebrandt*, 432 U.S. 183 (1977)	7
National Society of Professional Engineers v. *United States*, 435 U.S. 637 (1978)	11, 12, 13
Perez v. *Ledesma*, 401 U.S. 82 (1971)	7
Preiser v. *Newkirk*, 422 U.S. 395 (1975)	7

PAGE

Royster Drive-In Theatres, Inc. v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246 (2nd Cir.), *cert. denied*, 361 U.S. 885 (1959) 8

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 7

Twentieth Century-Fox Film Corp. v. *Samuel Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964) 8

Tyrell v. *District of Columbia*, 243 U.S. 1 (1917) 7

United States v. *Capitol Service, Inc.*, 568 F. Supp. 134 (E.D. Wis. 1983) 5, 6

United States v. *Capitol Service, Inc.*, 756 F.2d 502 (7th Cir. 1985) 6, 7

United States v. *Ortiz*, 422 U.S. 891 (1975) 7

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 12, 13

Viking Theatre Corp. v. *Paramount Film Distributing Corp.*, 320 F.2d 285 (3d Cir. 1963), *aff'd*, 378 U.S. 123 (1964) 10

White Motor Co. v. *United States*, 372 U.S. 253 (1963) 7

Wilder Enterprises, Inc. v. *Allied Artists Pictures Corp.*, 1979-2 Trade Cases ¶ 62,886 (E.D. Va. 1979) *aff'd in part and in part vacated on other grounds*, 632 F.2d 1135 (4th Cir. 1980) 9

Rules

Federal Rules of Civil Procedure 65(d) 6

Supreme Court Rule 17.1(a) 10

Text

Stern & Gressman, *Supreme Court Practice* (5th ed.), pp. 885-6 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-234

UNITED ARTISTS COMMUNICATIONS, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR AMICI CURIAE IN SUPPORT OF RESPONDENT AND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTEREST OF THE AMICI CURIAE

This amicus brief is filed in support of respondent, with the consent of all parties, on behalf of nine motion picture distribution companies. The letters of consent are being filed concurrently with the Clerk of this Court. The nine companies are: Buena Vista Distribution Co., Inc.; Columbia Pictures Industries, Inc.; Embassy Pictures; Orion Pictures Distribution Corp.; Paramount Pictures Corporation; Twentieth Century-Fox Film Corporation; United Artists Corporation; Universal Film Exchanges, Inc.; and Warner Bros. Distributing Corporation.

The amici are motion picture distributors who compete with each other for the talent which goes into the production of feature films, and they also compete for the right to distribute

films produced by independent producers. These amici "manufacturer-wholesalers" also compete with each other, as to each of their films, for access to the "retail market" consisting of theatres operated by motion picture exhibitors such as petitioner and its co-defendants Capitol Service, Inc., Kohlberg Theatres Corporation and Marcus Theatres Corporation.

Petitioner and its co-defendants are motion picture theatre owners and operators who control 94 percent of the first-run screens in the Milwaukee metropolitan area. By agreeing among themselves to "split" all of the distributors' films so that only one exhibitor has the right to negotiate for a given film, they have deprived these distributors of the right to market their products in a free competitive market. As the district court held, they have thereby controlled prices by substantially doing away with guarantees and firm term bids, obtaining greater adjustments on film rentals, and dictating the length of the playing time of a film. In this way they divert to exhibitors revenues which otherwise in a competitive market would reward the most competent producers and distributors, a market distortion which necessarily affects adversely the movie-going public with regard to the number and quality of feature films available, to the public injury.

Petitioner and its co-defendants also own and operate 1,000 motion picture theatre screens throughout the country and many theatres throughout Wisconsin, and they admit to being parties to split agreements in such other areas. In the petition filed with this Court, petitioner concedes that defendants' wrongdoing in Milwaukee should be enjoined. Petitioner also acquiesces to the injunction decree as modified by the court of appeals, which incorporated into the judgment the district court's definition of a split as an agreement not to

engage in competitive bidding, an agreement not to negotiate for pictures until they have been split, and an agreement not to negotiate for films split to other exhibitors. Nonetheless petitioner has filed this petition to ask this Court to comment on the court of appeals' opinion wherein it states that splits represented by petitioner to be "good" splits are anticompetitive. Petitioner seeks such an advisory ruling that it might make new split agreements in Milwaukee and elsewhere and be permitted to defend each one, case by case, as a reasonable restraint under the rule of reason.

Petitioner seeks to persuade this Court to such a ruling because it would be tantamount to a license to continue to violate the law. Neither the government nor these distributors would have the resources to pursue each such horizontal agreement among exhibitors city by city, and the problem is compounded for these distributors by the fact that a distributor daring to challenge splits in court is faced with retaliatory refusals to deal by dominant nationwide 1000-screen theatre-owner chains. (Tr. 3441, 1289, 128, 3954, 2411, 1127.)

Only the continuance of the application of the *per se* rule will deter such invidious conduct in the future in Milwaukee and in other markets. In the absence thereof, exhibitors will conclude that it is cheaper to litigate than to bring their business practices into conformity with the law. This view was presented by the president of one of the exhibitor defendants, discussing this very action, when he wrote:

> "Speaking for myself and my equity in the theatres, this suit would have to get very expensive before it would be cheaper in the long run to go to open bidding than pay the legal fees." (Memorandum of Dean D. Fitzgerald, President, Capitol Service, Inc., dated May 8, 1980, GX 41.)

SUMMARY OF ARGUMENT

Petitioner did not appeal from any of the findings and conclusions of the district court, and it concedes that the judgment and injunctive decree as modified by the court of appeals meet the objections which they raised in that court. Therefore it is not seeking to appeal from any judgment or order; it merely seeks to have this Court comment on language in the Seventh Circuit's opinion. There is therefore no judgment presented for reversal or modification to this Court, and the case is moot.

Even if petitioner had preserved its right to appeal the adjudication of *per se* illegality instead of conceding it and acquiescing in that ruling by the lower court, there is neither a conflict among circuits nor any new issue for determination by this Court. Horizontal arrangements to foreclose competition such as that among petitioner and its co-defendants have uniformly been condemned by courts of appeal and by this Court. Furthermore, even if the issue of *per se* illegality had been raised, the lower courts had ample evidence before them to support the ruling of *per se* illegality and the judgment decree as modified. Petitioner's horizontal agreement with its co-defendants is a restraint which is clearly unlawful *per se* under prior rulings of this Court and does not present any new issues for determination.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS ACQUIESCED IN ALL OF THE RULINGS OF THE LOWER COURTS AND THERE IS NO ORDER OR DECREE AS TO WHICH IT SEEKS REVERSAL. PETITIONER HAS FAILED TO PRESENT ANY JUSTICIABLE CONTROVERSY FOR RULING BY THIS COURT.

The district court found and concluded: "THE MILWAUKEE SPLIT IS PER SE ILLEGAL". *United States* v. *Capitol Service, Inc.*, 568 F.Supp. 134, 148 (E.D. Wis. 1983). The district court entered judgment enjoining the defendants as follows:

> "The defendants are hereby enjoined from further engaging in any motion picture split agreements, in any form and with any person, in any motion picture exhibition market throughout the United States." (568 F. Supp. 155.)

In their appeal to the Court of Appeals for the Seventh Circuit, petitioner and its co-defendants did not appeal from the district court's ruling that the Milwaukee split is illegal *per se*. They waived this issue by the following statement in their Brief (p. 6):

> "[M]indful of the mandate of Rule 52(a) that findings of fact may not be set aside unless clearly erroneous, (which places a severe burden on appellants), appellants are not directing this appeal at the merits of the lower court's conclusions about the Milwaukee split itself."

On appeal petitioner and its co-defendants objected only that the injunction was too broad in failing to refer to three specific elements found to exist in the Milwaukee split; and the court of appeals modified the judgment to satisfy petitioners' objection that the term "split" in the injunction should have

been defined to relate to "the three specific Milwaukee Agreements." The Court of Appeals ruled:

> "Appellants also contend that the injunction is imprecise in that 'split' is not defined. See *Federal Rules of Civil Procedure* 65(d). We believe, however, that the District Judge carefully defined the term 'split' as used in his injunctive order as follows:
>
> 1. 'an agreement not to engage in competitive bidding.'
> 2. 'an agreement . . . not to negotiate for pictures until they have been split,' and
> 3. 'an agreement . . . not to negotiate for films split to other [exhibitors].'
>
> *United States* v. *Capitol Service, Inc.*, 568 F. Supp. at 143, 145. We also believe that this definition should be regarded as incorporated into his judgment. It is so ordered." (*United States* v. *Capitol Service, Inc.*, 756 F.2d 502, 507 (7th Cir. 1985).)

The petition to this Court concedes that neither the *per se* ruling nor the judgment as modified are contested:

> "The district court, **in a finding petitioners did not appeal from,** ruled that **the split before it was illegal per se** since it involved agreements by the exhibitors not to engage in competitive bidding, not to negotiate for pictures until they had been split and not to negotiate for films split to other exhibitors (Pet. App. 4a-5a). In its injunction, however, the district court went beyond the specific split involved in this case. . . .
>
> "On appeal, the Seventh Circuit ordered that the district court's injunction be read as applying only to splits which involved agreements not to engage in competitive bidding, not to negotiate for pictures until they have been split and not to negotiate for films split to other exhibitors (Pet. App. 11a). At the same time, however, the Seventh Circuit's **opinion contains language** which could be interpreted as condemning even so-called 'good' splits. . . ." (Petition, pp. 5, 6; emphasis supplied.)

Therefore, since petitioner admits that the judgment as modified by the court of appeals met the only objections it

raised in that court, petitioner has waived its right to present additional matters to this Court. *United States* v. *Ortiz,* 422 US 891, 898 (1975); *Tyrell* v. *District of Columbia,* 243 US 1 (1917); *California* v. *Taylor,* 353 US 553 (1957). Furthermore, petitioner is in effect only requesting affirmance with an admonition to the court of appeals with respect to language in its opinion. Petitioner cannot appeal from an injunction which was modified in accordance with its requests to the court of appeals. *Perez* v. *Ledesma,* 401 US 82, 87 (1971); *Gunn* v. *University Committee,* 399 US 383, 390 (1970). In addition, the court of appeals having modified the decree in exact accordance with petitioner's stipulations, this case is moot and there is no case or controversy presented to this Court for adjudication. *Preiser* v. *Newkirk,* 422 US 395, 401 (1975); *Jones* v. *Hildebrandt,* 432 US 183, 187 (1977); Stern & Gressman, *Supreme Court Practice* (5th ed.), pp. 885-6.

II.

THERE IS NEITHER A CONFLICT AMONG CIRCUITS NOR ANY NEW ISSUE FOR DETERMINATION BY THIS COURT. HORIZONTAL ARRANGEMENTS TO FORECLOSE COMPETITION SUCH AS THIS HAVE UNIFORMLY BEEN CONDEMNED BY COURTS OF APPEAL AND BY THIS COURT.

Contrary to petitioner's contentions, the term "split" has obtained an established meaning in the courts which is consistent with the Seventh Circuit's statement that "a right of first negotiation as described by defendants, no matter how flexible in theory, is an agreement among competitors to a horizontal restraint on competition illegal *per se* under Section 1. *White Motor Co.* v. *United States,* 372 U.S. 253, 263 . . . (1963); *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593 (1951)." (756 F.2d 506). All other circuits that have considered this question have consistently reached the same con-

clusion as the Seventh Circuit with regard to the anticompetitive nature of such horizontal arrangements among exhibitors. For example:

Royster Drive-In Theatres, Inc. v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 250 (2nd Cir.), *cert. denied*, 361 U.S. 885 (1959):

> "the so-called 'split' system, whereby exhibitors divide the list of available pictures and then approach the distributors separately on that basis, enables them to purchase films at lower prices."

Twentieth Century-Fox Film Corp. v. *Samuel Goldwyn*, 328 F.2d 190, 205-6 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964):

> "... [T]he agreements referred to in the findings of fact, were, for the most part, arrangements between exhibitors, under which a given exhibitor was given the first opportunity to negotiate for a picture or pictures. There were, however, no agreements that if the first negotiation failed the other exhibitor or exhibitors were foreclosed from negotiating for the picture. Nor were there any agreements as to prices to be offered or paid....
>
> * * * *
>
> "[This constituted a concert of exhibitors which] restrained and eliminated competition with respect to plaintiff's pictures by agreements to eliminate competitive bidding."
>
> * * * *
>
> "... [H]onest competitive bidding resulted in the payment of higher film rentals, and increased playing time as compared to ... [split agreements]."

Dahl, Inc. v. *Roy Cooper Co., Inc.*, 448 F.2d 17, 20 (9th Cir. 1971):

> "... [E]xhibitors in the area operated under a 'split-of-product' agreement ... by which they divided the available film between themselves so as to eliminate competition between themselves as to those films.... [T]he agreement [was] ... anticompetitive in character and as such subject to complaint by the distributors."

Admiral Theatre Corp. v. *Douglas Theatre Co.*, 437 F. Supp. 1268, 1294 (D. Neb. 1977), *aff'd*, 585 F.2d 877 (8th Cir. 1978):

> "Exhibitor-defendants' split, which was formed to lessen the distributors' ability to extract onerous rental terms, was designed to limit competition among the split members by dividing films in such a way that any member would not have to bid against another member to obtain a film."

Cinema-Tex Enterprises, Inc. v. *Santikos Theatres, Inc.*, 414 F. Supp. 640, 643 (W.D. Tex 1975), *aff'd in part and rev'd in part* (vacating *per se* ruling as unnecessary to disposition of the case), 535 F.2d 932 (5th Cir. 1976):

> "The distributor . . . could deal only with the exhibitor who was awarded the picture in the split unless negotiations with that exhibitor were non-productive and the distributor could solicit bids from other exhibitors. As the Ninth Circuit pointed out in *Dahl, Inc.* v. *Roy Cooper Co.*, 448 F.2d 17 (9th Cir. 1971), such an anticompetitive agreement would give rise to legitimate complaint by distributors."

Wilder Enterprises, Inc. v. *Allied Artists Pictures Corp.*, 1979-2 Trade Cases ¶ 62,886, p. 79,129 (E.D. Va. 1979) *affirmed in part and in part vacated on other grounds*, 632 F.2d 1135 (4th Cir. 1980):

> "The evidence showed the sole purpose and effect of the split was to curtail competitive bidding by split members so as hopefully to lower prices of film licenses."

General Cinema Corp. v. *Buena Vista Distribution Co., Inc.*, 532 F. Supp. 1244, 1252 (C.D. Cal. 1982):

> "After carefully reviewing the record, however, the court has come to the conclusion that all splits by definition have at least one critical anticompetitive characteristic in common—an agreement or understanding by exhibitors participating in the split to refrain from competing against the split designee while its right or opportunity to negotiate continues."

Petitioner states as to a number of the foregoing authorities that they held splits "not to be illegal *per se*". (Petition, pp. 2, 3). It is apparent from the foregoing quotations that these courts did not so hold. A number of them did hold that a plaintiff exhibitor failed to show injury from a split when the distributors afforded to him the opportunity to compete for films. This was also the fact in *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F.2d 285 (3d Cir. 1963), affirmed without opinion by an equally divided court, 378 US 123 (1964), where the plaintiff exhibitor did not argue that all split systems were illegal, but only that it was illegal to exclude him from the split even though he was at all times afforded the opportunity to license the films of each distributor notwithstanding the split. (320 F.2d 293.)

Therefore it is apparent that petitioner has not shown that this case is one that comes within the terms of Rule 17.1(a) as "[one in which] a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter...." For the alleged conflict among courts of appeals, petitioner relies primarily on a district court decision, *Greenbrier Cinemas, Inc.* v. *Attorney General*, 511 F. Supp. 1046 (N.D. Va. 1981). (Petition, pp. 4, 5, 6, 9.) Not only is this not a "decision of another court of appeals"; it is also the case that the *Greenbrier* case was so limited by stipulation that it does not constitute a precedent. Thus the Court of Appeals in the instant case noted that *Greenbrier* "has been the subject of criticism" (756 F.2d 505); and in *General Cinema Corp.* v. *Buena Vista Distribution Co.*, 532 F. Supp. 1244, 1265 (N.D. Cal. 1982) the court found the *Greenbrier* analysis "flawed in several critical respects", including a stipulation that no evidence regarding the purpose or effect of splits would be offered, resulting in "the emptiness of the *Greenbrier* holding as a result of this stipulation" because of the *Greenbrier* court's admission that consequently it ruled "**regardless of any effect it might or might not have had on competition or price.**" (532 F. Supp. 1265; emphasis is the court's.)

Nor is petitioner correct when it contends that this case raises new issues of application of the antitrust laws. This case presents merely another example of a horizontal agreement among competitors not to compete, for the purpose of fixing lower prices to be paid by them. Such arrangements have been consistently held by this Court to be unlawful *per se*.

Petitioner testified at trial that even under petitioner's concept of the right of first negotiation (1) it was envisaged that there would be a period from the time that the invitations to bid went out until the picture was split, during which if a distributor approached an exhibitor, the distributor would be rebuffed in attempting to license the picture, (2) the precepts of the split called for a period during which a member of the split would be unable to negotiate with an invitational contact from a distributor by virtue of his agreement with the rest of the split members, and (3) "that's inherent in the term right-of-first-negotiation." (Tr. 4042-3.) Such horizontal agreements to refuse to participate in competitive bidding or competitive negotiations fall clearly within the strictures of *National Society of Professional Engineers* v. *United States,* 435 US 679 (1978).

The authorities cited by petitioner (Petition, p. 9) do not conflict with these principles. In particular, *Continental TV, Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977), relates to vertical restraints imposed by individual manufacturers on their dealers to promote competition between brands and does not sanction horizontal agreements among competitors such as defendants.

In *Broadcast Music, Inc.* v. *Columbia Broadcasting Systems, Inc.,* 441 U.S. 7 (1979), the agreements made music more widely available yet did not restrict the ability of copyright holders to license performances directly. The blanket license thus created a new competitive alternative: the performer could acquire rights by individual license or blanket license. In contrast:

> "[This agreement] is fundamentally different [from that in *Broadcast Music*] .... [It] is composed of individual[s] ... who compete with one another [and who do not offer a single unique product as joint venturers] ....
>
> ".... But the ... agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price fixing mold."

Arizona v. *Maricopa County Medical Society,* 457 U.S. 332, 356, 357 (1982).

The defendant exhibitors have admitted under oath that "the reason [for going] ... into the meeting [organizing the split] was to avoid bidding on pictures", and that the splitting agreement allows the companies "to allocate pictures among ourselves. We ... didn't have to put up the huge guarantees because we knew we weren't bidding against each other." (Tr. 1099-1100.) They testified that "the object was to stop killing each other on getting films" and "if we were going to have an arrangement like this, none of us would be responding to a bid." (Tr. 1807-1815.)

By thus agreeing to eliminate competition, they

> "have avoided some of those pitfalls [of higher terms and length of run] by not having a rush into bidding arrangement."
>
> "... those terms are automatically lower for the guy that doesn't have to bid." (Tr. 1067; 1033-4; see also Tr. 1820, 2713, 2771 and Tr. 575-77, 608.)

Such agreements to eliminate competition as the price-setting mechanism are conclusively deemed to be illegal price-fixing agreements without more. *National Society of Professional Engineers* v. *U.S.,* 435 U.S. 679, 681-2 (1978); *Catalano* v. *Target Sales,* 446 U.S. 643, 647 (1980):

> "In *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), we held that an agreement among competitors to

> engage in a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful without any inquiry into the reasonableness of the program, even though there was no direct agreement on the actual prices to be maintained. In the course of the opinion, the Court made clear that 'the machinery employed by a combination for price fixing is immaterial.' "

Petitioner's criticism of competition in film licensing for "lack of flexibility which often makes it impossible to shorten the length of a run or move a picture to a smaller theatre" (Petition, p. 7) is in reality a defense of a system whereby these exhibitors as concerted monopsonists are able to preempt feature films without sharing any risk of loss and without being bound by contract to exhibit a film for any specified length of time. Similarly, the condemnation of competition's "haphazard and irrational allocation of available pictures to screens" (ibid.) is the hackneyed protest of the cartelists that they could allocate resources more efficiently than competition does.

> "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination." *Arizona* v. *Maricopa County Medical Society,* 457 US 332, (1982), quoting *Socony-Vacuum;* see also *National Society of Professional Engineers* v. *U.S.,* 435 U.S. 679, 690, 692, 696 (1978); *Catalano, Inc.* v. *Target Sales, Inc.,* 446 U.S. 643, 649 (1980).

CONCLUSION

For the foregoing reasons, amici respectfully suggest that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT W. BERGSTROM

Attorney for
BUENA VISTA DISTRIBUTION CO., INC.
COLUMBIA PICTURES INDUSTRIES, INC.
EMBASSY PICTURES
ORION PICTURES DISTRIBUTION CORP.
PARAMOUNT PICTURES CORPORATION
TWENTIETH CENTURY-FOX FILM CORPORATION
UNITED ARTISTS CORPORATION
UNIVERSAL FILM EXCHANGES, INC. and
WARNER BROS. DISTRIBUTING CORPORATION
Amici Curiae